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04-808

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JON A. OZMINT, Director, South Carolina Department of Corrections,
Petitioner and Cross-Respondent,

v.

LARRY EUGENE HALL,
Respondent and Cross-Petitioner.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent and Cross-Petitioner, Larry Eugene Hall, through the undersigned counsel, asks leave to file the Brief in Opposition to the Petition for a Writ of Certiorari and to proceed *in forma pauperis*.

Hall was declared indigent prior to his trial in 1992. He has remained indigent and represented by court-appointed counsel since that time. He was previously granted leave to proceed *in forma pauperis* before this Court following affirmance of his convictions and death sentence by the South Carolina Supreme Court. *Hall v. South Carolina*, 512 U.S. 1246 (1994). He was also recently granted leave to file a Conditional Cross-Petition *in forma pauperis*.

Because of Hall's poverty, he is unable to pay the costs of these proceedings or give security therefor. An affidavit from Mr. Hall and an explanatory affidavit from the undersigned counsel are attached. An affidavit from Mr. Hall's appointed guardian, Desa A. Ballard, in support of this motion was previously submitted.

Teresa L. Norris

TERESA L. NORRIS

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COUNSEL FOR LARRY HALL.

February 16, 2005.

04-808

IN THE SUPREME COURT OF THE UNITED STATES

JON A. OZMINT, Director, South Carolina Department of Corrections,
Petitioner and Cross-Respondent,

v.

LARRY EUGENE HALL,
Respondent and Cross-Petitioner.

AFFIDAVIT OF TERESA L. NORRIS

I, Teresa L. Norris, being first duly sworn, depose and say that I am a member of this Court's bar. I have been court-appointed counsel for Larry Eugene Hall, the Respondent and Cross-Petitioner in the above-entitled case, for the last 10 years.

On January 12, 2005, I submitted a conditional cross-petition for certiorari accompanied by a motion to proceed in forma pauperis for the cross-petition and the brief in opposition to the State's petition. I also submitted an affidavit from Mr. Hall's guardian reciting the facts necessary to establish Mr. Hall's indigence. On January 21, I was informed by Clayton Higgins of the Clerk's office that I needed to obtain Mr. Hall's signature on an affidavit. I explained to Mr. Higgins that I do not believe that Mr. Hall is mentally competent to understand the nature of these proceedings and that is why his guardian was asked to submit the affidavit. I was informed that I still needed to obtain an affidavit from Mr. Hall and that I should provide any explanation necessary in my own affidavit. I was also informed that I should submit separate motions and affidavits for the cross-petition and the brief in opposition.

With the assent of Mr. Hall's guardian, Desa Ballard, Esq., I have obtained Mr. Hall's signature on the affidavit of indigence, which is attached.

I declare under penalty of perjury that the foregoing is true and correct.

Teresa L. Norris

TERESA L. NORRIS

SWORN to and subscribed before me
this 10th day of Feb., 2005.

Notary Public
My Commission Expires: 8-29-08

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Larry Hall, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ n/a	$ n/a	$ n/a	$ n/a
Self-employment	$ n/a	$ n/a	$ n/a	$ n/a
Income from real property (such as rental income)	$ n/a	$ n/a	$ n/a	$ n/a
Interest and dividends	$ n/a	$ n/a	$ n/a	$ n/a
Gifts	$ 30.00	$ n/a	$ 30.00	$ n/a
Alimony	$ n/a	$ n/a	$ n/a	$ n/a
Child Support	$ n/a	$ n/a	$ n/a	$ n/a
Retirement (such as social security, pensions, annuities, insurance)	$ n/a	$ n/a	$ n/a	$ n/a
Disability (such as social security, insurance payments)	$ n/a	$ n/a	$ n/a	$ n/a
Unemployment payments	$ n/a	$ n/a	$ n/a	$ n/a
Public-assistance (such as welfare)	$ n/a	$ n/a	$ n/a	$ n/a
Other (specify): _____	$ n/a	$ n/a	$ n/a	$ n/a
Total monthly income:	$ 30.00	$ n/a	$ 30.00	$ n/a

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
n/a			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
n/a			$
			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
n/a		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☒ Other assets
Description Prison Canteen
Value approx $19.00

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
n/a	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
n/a		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ n/a	$ n/a
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ n/a	$ n/a
Home maintenance (repairs and upkeep)	$ n/a	$ n/a
Food	$ n/a	$ n/a
Clothing	$ n/a	$ n/a
Laundry and dry-cleaning	$ n/a	$ n/a
Medical and dental expenses	$ n/a	$ n/a

	You	Your spouse
Transportation (not including motor vehicle payments)	$ n/a	$ n/a
Recreation, entertainment, newspapers, magazines, etc.	$ n/a	$ n/a
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ n/a	$ n/a
Life	$ n/a	$ n/a
Health	$ n/a	$ n/a
Motor Vehicle	$ n/a	$ n/a
Other: _____	$ n/a	$ n/a
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ n/a	$ n/a
Installment payments		
Motor Vehicle	$ n/a	$ n/a
Credit card(s)	$ n/a	$ n/a
Department store(s)	$ n/a	$ n/a
Other: _____	$ n/a	$ n/a
Alimony, maintenance, and support paid to others	$ n/a	$ n/a
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ n/a	$ n/a
Other (specify): Cigarettes	$ 30.00	$ n/a
Total monthly expenses:	$ 30.00	$ n/a

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been on death row since 1991.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Jan 25, 2005

Larry Hall
(Signature)

No. 04-808

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

JON E. OZMINT, Director, South Carolina Department of Corrections,
Petitioner,

v.

LARRY EUGENE HALL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF SOUTH CAROLINA

CAPITAL CASE

TERESA L. NORRIS
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P.O. Box 11311
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CAPITAL CASE

QUESTION PRESENTED

Whether the Supreme Court of South Carolina erred in ordering resentencing in a capital case in which, seven months after this Court decided *Payne v. Tennessee*, defense counsel failed to object to a prosecutor's closing argument that the state supreme court found, on the facts of the particular case, was objectionable because – in *Payne's* plain terms – it was so unduly prejudicial as to offend Due Process.

INTERESTED PARTIES

The following parties in addition to those named in the caption have an interest in the proceeding:

Desa A. Ballard, Esq.
226 State Street
West Columbia, SC 29169
phone: (803) 796-9299
fax: (803) 796-1066

(By order of the South Carolina Supreme Court dated August 4, 2004, attorney Ballard was appointed guardian for Larry Hall in his successor post-conviction relief action pending before the Court of Common Pleas of Pickens County, pursuant to Rule 1.14(b) of the Rules of Professional Conduct, Rule 407, SCACR.)

The State of South Carolina

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Petitioner Ozmint (hereafter "the State")[1] has filed this petition for *certiorari* seeking review of a decision of the Supreme Court of South Carolina ordering a new capital sentencing hearing for Respondent, Larry Eugene Hall (hereafter "Hall").

The Supreme Court of South Carolina held that the prosecutor's use of victim impact evidence during closing argument was unduly prejudicial and that Hall's lawyer rendered ineffective assistance of counsel in failing to object to it. In an effort to make the case appear *cert.*-worthy, the State's petition attributes to the state court rulings that the court never made and indeed *explicitly* rejected. The actual basis for the decision below is a fact-bound, case-specific ruling that presents no issue warranting this Court's consideration on *certiorari*.

STATEMENT OF THE CASE

On June 27, 1991, this Court decided *Payne v. Tennessee*, 501 U.S. 808. That decision overruled the Court's earlier holdings in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) that the Eighth and Fourteenth Amendments erected a categorical bar against "the admission of victim impact evidence and prosecutorial argument on that subject." *Payne*, 501 U.S. at 827. The Court in *Payne* said:

> "In the majority of cases ... victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."

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[1]Since Ozmint is the Director of the South Carolina Department of Corrections appearing in his official capacity and represented by the State Attorney General, it will be clearer to refer to the Petitioner simply as "the State."

Payne, 501 U.S. at 825. The *Payne* opinion carefully explained the legitimate purposes for victim impact evidence in responding to the

> "concern voiced in *Booth*'s case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. *Booth*, ... 482 U.S., at 506, n. 8. As a general matter, ... victim impact evidence is not offered to encourage comparative judgments of this kind for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."

Payne, 501 U.S. at 823.

On October 7, 1991, the Supreme Court of South Carolina filed its opinion in *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547, spelling out the relevance of *Payne* to future South Carolina capital sentencing hearings.

> "Recently, in *Payne v. Tennessee*, ... the United States Supreme Court restated the law regarding evidence and arguments as to the impact of the crime on the victim and the victim's family. In that opinion, the High Court for the first time held that in a capital sentencing proceeding such evidence is not per se inadmissible pursuant to the eighth amendment. The Court noted that 'the true measure of crimes is the injury done to society.'"

Johnson, 306 S.C. at 132, 410 S.E.2d at 555. The state court announced that victim impact evidence would be admissible under South Carolina criminal law, quoting *Payne* as follows:

> "We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated."

Id.

On January 24, 1992, the penalty phase of Hali's capital murder trial began. During closing argument, the solicitor argued that:

> "Every time a jury sits something special happens, and I am not talking about duty. I am talking about values, because a jury verdict is a statement of values."

App. 1568. He then proceeded to describe the "values" that the jury should declare through its verdict:

> "And I am not talking about dollars and cents as far as what the life of Wendy Murphree and Lori Murphree was worth, but nevertheless it is a question of values. What are the lives of these two girls worth? Are they worth at least the life of this man, the psychopath, this killer who stabs and stabs and kills and rapes and kidnaps? The defense will say, well, taking his life will not bring these girls back. That is not what I am talking about folks. I am simply saying how profane, how profane to give this man a gift of life of twenty years or thirty years, however long it would be before he got out..."

App. 1568-1569. Defense counsel at this point objected to the mention of twenty or thirty years, the trial judge acknowledged that he would charge the law, and the solicitor proceeded with his closing argument uninterrupted. App. 1568-69.

REASONS FOR DENYING THE WRIT

The State's entire argument for *certiorari* depends on reading the South Carolina Supreme Court decision as expanding *Payne v. Tennessee*, 501 U.S. 808 (1991), and retroactively finding ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), based on this expansion. Both of these readings are manifestly wrong.

What the South Carolina Supreme Court below held – and so explicitly as to make any other reading a plain distortion of both text and law – was that the prosecutor's closing argument was sufficiently prejudicial as to have violated Hall's right to due process, *Hall v. Catoe*, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004), a ground of objection identified in the *Payne* opinion seven months *before* Hall's sentencing trial. Hall's lawyer was held ineffective for failing to make this objection despite the unfairly prejudicial nature of the argument. The State's efforts to strain this narrow finding into a broad rule of law that would expand the protections afforded future South Carolina defendants under *Payne* are disingenuous.

The state court began its analysis by recapitulating the relevant, uncontroversial law regarding ineffective ass ance of counsel.

> "A criminal defendant is constitutionally entitled to effective representation. *Rogers v. State*, 261 S.C. 288, 199 S.E.2d 761 (1973). In order to find trial counsel ineffective, this Court must find that counsel's conduct was deficient and that the deficiency prejudiced the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984)."

360 S.C. at 361, 601 S.E.2d at 339. Under this standard it concluded that trial counsel's failure to object to a prosecutorial argument which was so prejudicial that it should have alerted counsel to an objection spelled out in those precise terms on the face of the *Payne* opinion itself denied Hall his constitutional right to effective assistance of counsel. *Id.*

To explain why the prosecutor's argument came within the Due Process prohibition recognized in *Payne*, the state court identified four impermissible characteristics of the

prosecutor's appeal to "values" in asking the jury to base a death sentence on a comparison between the worth of Hall's life and that of his victims:

> "the solicitor's comparison (1) was so emotionally inflammatory that it became a material part of the jury's deliberation process; (2) unquestionably directed the jurors to conduct an arbitrary balancing of worth, which required that Hall be sentenced to death if the jury found Hall's life was worth less than the lives of his victims; (3) is totally unrelated to the circumstances of the crime; and (4) is distinguishable from traditional impact evidence in that it was not actually offered to show the impact of the crime on the victims or the victims' family."

360 S.C. at 364, 601 S.E.2d at 341. The impermissibility of each of these characteristics derives directly from this Court's explication of the permissible uses of victim impact evidence in *Payne*.[2]

In assessing trial counsel's failure to object, the Supreme Court of South Carolina did not **"deem[]" "Trial Counsel in 1991 ... deficient in not anticipating ... [a] 2004 change ... [in the law of] *Payne*"** (Petition for Certiorari, pp. 9-10) (emphasis in original). The court did not base its finding on any law established subsequent to *Payne* itself. Nor, indeed,

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[2] Each facet of *Hall*'s holding quoted immediately above tracks this Court's language in *Payne*: (1) "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne*, 501 U.S. at 825; (2) "As a general matter, however, victim impact evidence is not offered to encourage comparative judgments ... [but] to show instead ***each*** victim's 'uniqueness as an individual human being.'" *Payne*, 501 U.S. at 823; (3) "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Payne*, 501 U.S. at 825; (4) "A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne*, 501 U.S. at 827.

has there *been* any change in the South Carolina Supreme Court's interpretation of *Payne*.[3] The State's reliance on *Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160 (2002), to demonstrate a change is particularly misplaced because the holding in *Humphries* that *Payne* does not prohibit comparisons between the defendant and the victim as such was explicitly reaffirmed in *Hall* and found consistent with the *Hall* decision. 360 S.C. at 363 n.4, 601 S.E.2d at 340 n.4. The South Carolina Supreme Court ruled that "the solicitor's argument in Hall's trial is distinguishable from the solicitor's argument in *Humphries*" (360 S.C. at 363, 601 S.E.2d at 341) and that the *particular* argument made in *Hall* was unduly prejudicial.[4]

The State simply misdescribes the *Hall* decision that it asks this Court to review. In its petition for *certiorari*, the State describes the *Hall* case as aberrant and as holding "that victim-defendant comparisons are improper." This is not the holding of *Hall*. The South Carolina Supreme Court in *Hall* states unequivocally that it is holding the prosecutor's closing argument improper not because it compared victim with defendant, but because it did so in a way that was impermissible and prejudicial.[5] The State itself recognizes this

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[3] Indeed, in 1994, the South Carolina Supreme Court explicitly held that "a court may admit evidence of the specific harm done by a defendant so that a jury may meaningfully consider the defendant's blameworthiness at the sentencing phase of trial," but specified that such material should not be used "to encourage comparative character analysis." *State v. Southerland*, 316 S.C. 377, 385, 447 S.E.2d 862, 867 (1994).

[4] This was also the reading of the South Carolina Supreme Court's *Hall* and *Humphries* decisions by the Fourth Circuit *en banc*, denying Humphries federal habeas relief in *Humphries v. Ozmint*, 2005 W.L. 26794 *15-16 (4th Cir. Feb. 4, 2005) (*en banc*)).

[5] "In the present case, the solicitor not only suggested that Hall's life was worth less than his victims', he developed an arbitrary formula whereby if the jury finds Hall's life worth less than his

distinction under *Payne* through its repeated citation of *State v. Tucker*: "Victim impact evidence is clearly admissible because it slows [*sic*] the victim's uniqueness as an individual **so long as it does not render the trial unfair**." Petition for Certiorari, p. 14 (emphasis added) (citing *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996)).

The Supreme Court of South Carolina carefully observes this distinction and twice explains in *Hall* how its decisions in *Hall* and *Humphries* are consistent. First, it reiterates that its decision in *Hall* does not announce any general prohibition of victim-to-defendant comparisons. 360 S.C. at 363, 601 S.E.2d at 340. Second, it points to the facts of *Humphries* to explicate by contrast the prejudicial nature of the solicitor's argument in *Hall*. *Id* at 363-364, 601 S.E.2d at 340-341. It ultimately concludes:

> "[W]e disagree that the victim-defendant comparison found in our account of *Humphries* is as prejudicial as the comparison in [*Hall*]. We continue to distinguish the facts of *Humphries* with that of the present case and maintain that these factual differences yield a different interpretation as a matter of law."

360 S.C. at 363 n.4, 601 S.E.2d at 340 n.4. Yet, despite this unambiguous declaration, the State asks this Court to review *Hall* on the theory that *Hall* changes the law that *Humphries* declared "as recently as 2002." Petition for Certiorari, p. 11.[6]

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victims', then the jury could reach no other conclusion than that the death penalty is justified." 360 S.C. at 364, 601 S.E.2d at 340.

[6] The State goes so far as to claim that the sentence in *Hall* would have been affirmed by the South Carolina Supreme Court "based on its own analysis as recognized in *Humphries*" (Petition for Certiorari, p. 25) despite the repeated assertions of that very court that the two cases are consistent.

The State is obviously right that the performance of Hall's trial counsel cannot be judged by hindsight from 2004, but it is altogether wrong in claiming that this is what the South Carolina Supreme Court did. Rather, a correct understanding of the history of *Payne*'s reception into South Carolina jurisprudence – as opposed to the State's revisionist history – weighs heavily in *support* of the state court's finding of ineffectiveness.

Hall was tried a mere seven months after this Court decided *Payne*. As the State's brief indicates, the Supreme Court of South Carolina in this interim approved the use of victim impact evidence in *Johnson*. 306 S.C. at 132, 410 S.E.2d at 555. In light of these developments, any adequate defense counsel facing a capital prosecution for the murder of two young girls would have read the *Payne* opinion. The face of this opinion – and, for good measure, even the *syllabus* – articulates not only the ground for, but also the *name* of the objection that Hall's attorney failed to make. Its reminder that evidence "is admissible so long as it is not so unduly prejudicial that it renders the trial fundamentally unfair," *Payne*, 501 U.S. at 825, was no mysterious clue requiring prescience to unravel. *Payne* itself quoted this familiar rule from *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986).

In the wake of *Payne*'s explicit reference to *Darden*, any competent defense attorney trying a capital case in 1991 and confronted with a prosecutor's argument urging the jury to render through its verdict a "statement of values" and to assess whether the lives of the victims were "worth" that of defendant Hall would have been alerted to object. That is all the South Carolina Supreme Court below held, and its ruling to this effect presents no case for *certiorari*.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

TERESA L. NORRIS
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(803) 765-0650

Counsel for Respondent/Cross-Petitioner
Larry Eugene Hall

February 10, 2005.

04-808

IN THE SUPREME COURT OF THE UNITED STATES

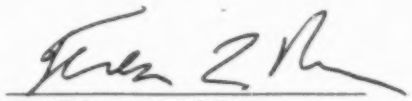
JON A. OZMINT, Director, South Carolina Department of Corrections,
Petitioner and Cross-Respondent,

v.

LARRY EUGENE HALL,
Respondent and Cross-Petitioner.

CERTIFICATE OF SERVICE

I certify that I have served upon the attorney for the Petitioner a copy of the Brief in Opposition to the Petition for Writ of Certiorari and a copy of the Motion for Leave to Proceed In Forma Pauperis in this action. Service was made by U.S. mail, first class, postage prepaid, to Donald J. Zelenka, Esq., Assistant Deputy Attorney General of South Carolina, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211. This the 10th day of February, 2005, in Columbia, South Carolina.



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COUNSEL FOR RESPONDENT.

February 10, 2005.